Supreme Court, U.S.
FILED

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NO. 98 480 SEP 17 1998

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In the Supreme Court of the United States

OCTOBER TERM, 1998

COMM-CARE CORPORATION
Petitioner,

v.

LOUISIANA TAX COMMISSION, et al.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
FOR THE STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Due process requires the states to provide a clear and certain remedy for aggrieved taxpayers to contest tax assessments. This may be provided in the form of pre-deprivation relief or post-deprivation relief or both. When a state provides both remedies by statutes clear and certain on their faces, may the courts of the state, by reading additional requirements into the statutes, deny relief to taxpayers who comply with the statutes' facial requirements, or is this another variation on the "bait and switch" scheme proscribed in *Reich v. Collins*, 115 S.Ct. 547 (1994).

FEDERAL QUESTION AS PRESENTED AND CONSIDERED IN STATE COURTS

1. In the state court of appeal, petitioner urged in brief that the state district court's summary dismissal for petitioner's failure to pay the subject taxes timely was a denial of due process under the Fifth and Fourteenth Amendments to the United States Constitution: See appendix 9, pp. 7, 11-13. The state court of appeal ignored petitioner's due process claim entirely. See appendix 3.

2. Petitioner again urged its due process claim in its application to the state supreme court for certiorari. See appendix 10, pp. 1, 4, 8-10. The state supreme court denied petitioner's application without reasons. See appendix 4.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Louisiana Supreme Court are the LOUISIANA TAX COMMISSIION; LEE J. THEVENOT, in his capacity as Assessor for the PARISH OF AVOYELLES, JEWETTE FARLEY, in her capacity as Assessor for the PARISH OF LINCOLN; ROY D. MILLER in his capacity as Assessor for the PARISH OF BEAUREGARD; GERALD McCRORY, JR. in his capacity as Assessor for the PARISH OF ASCENSION; EUGENE CAVANAUGH, in his capacity as Assessor for the PARISH OF VERNON; FRANK GRANGER, III, in his capacity as Assessor for the PARISH OF EAST BATON ROUGE; RALPH GILL, in his capacity as Assessor for the PARISH OF RAPIDES PARISH; CARMON WALKER, in his capacity as Assessor for the PARISH OF CATAHOULA; RICH BAILEY, in his capacity as Assessor for the PARISH OF QUACHITA; JOE TORN TRUNZLER, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF CATAHOULA; WILLIE WAYNE HOUCK, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF LINCOLN; WILLIAM EARL HILTON, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF RAPIDES; FRANK A. HOWARD, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF VERNON; HAROLD L. TRIDICO, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF ASCENSION; WILLIAM BELT, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF AVOYELLES; M. BOLIVAR BISHOP, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF BEAUREGARD; ELMER LITCHFIELD, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF EAST BATON ROUGE; LAYMON GODWIN, in his capacity as Sheriff and Ex-Officio Tax Collector of the PARISH OF OUACHITA.

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OPINIONS BELOW

The opinions of the state tax commission, the 19th Judicial District Court for East Baton Rouge Parish, Louisiana, the First Circuit Court of Appeal of the State of Louisiana, and the Supreme Court of the State of Louisiana are all unreported. They are reprinted in full at appendices 1, 2, 3 and 4, respectively.

BASIS FOR JURISDICTION

The judgment of the Supreme Court for the State of Louisiana was entered on June 19, 1998. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS

Section 1 of Article XIV of the Constitution of the United States of America provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction therof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On April 15, 1993, the Internal Revenue Service determined that petitioner Comm-Care Corporation ("Comm-Care") is organized and operated exclusively for charitable purposes as defined in §501(c)(3) of the Internal Revenue Code of 1986,[1] and that Comm-Care's proposed acquisition and operation of ten nursing homes (the "Facilities") in Louisiana were consistent with its charitable, exempt purposes. On March 1, 1994, in keeping with the Service's ruling letter, Comm-Care bought the Facilities located in nine different parishes in Louisiana. This petition relates only to the state courts' action with respect to Comm-Care's 1995 taxes but the procedural history began in 1994 when Comm-Care acquired the Facilities.

In April, 1994, pursuant to Article VII, §21B(1)(a) of the Louisiana Constitution of 1974,[2] Comm-Care notified the tax assessors of its acquistion of the Facilities and its exempt status and requested that the Facilities be placed on the exempt rolls for 1994 ad valorem tax purposes. The assessors refused and assessed the Facilities for 1994 taxes. Comm-Care paid the taxes under protest in January, 1995 and filed suits for refund within thirty days, strictly as prescribed by Louisiana's tax-refund statute.[3]

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[1] 26 U.S.C. §501(c)(3).

[2] "(There) shall be exempt from ad valorem taxation; property owned by a non-profit corporation or association organized and operated exclusively for...charitable, health, welfare...purposes, no part of the net earnings of which inure to the benefit of any private shareholder or member thereof and which is declared to be exempt from federal or state income tax..."

[3] R.S. 47:2110, printed in full at appendix 5, is Louisiana's "post-deprivation" remedy. See *Comm-Care Corporation v. Louisiana Tax Com-*

All of the suits[4] were summarily dismissed on grounds that Comm-Care had no cause of action under the refund statute because the taxes had not been paid timely, *i.e.* on or before the last day of the tax year. Although the refund statute makes no requirement for timely payment, the courts read this requirement into the statute by reading it in *pari materia* with other sections[5] which state that if the taxes are not paid by the end of the year, interest and penalty begin to accrue and the assessed property becomes subject to seizure and sale. One state court of appeal affirmed[6] and the other reversed.[7] On *certiorari*, the state supreme court affirmed the decision of the state court of appeal adverse to Comm-Care and reversed the decision of the other state court of appeal.[8] On rehearing, the state supreme court side-stepped Comm-Care's due process claim and disposed of the consolidated cases on an alternate ground: that the taxable status of property for each tax year must be determined by "the condition of things" on January 1, *ergo*, since

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footnote 3 continued

mission, 696 So.2d 969 (La. 1997); *cf. Reich v. Collins, supra.*

[4] Suits were filed in all nine parishes. Eight tax collectors agreed to a transfer and consolidation; one did not.

[5] See R.S. 47:2101, printed in full at appendix 6.

[6] *Comm-Care Corporation v. Louisiana Tax Commission*, 681 So.2d 1001 (La. App. 1st Cir. 1996), following its decision in *Capital Drilling Co. v. Graves*, 496 So.2d 487 (La. App. 1st Cir. 1986).

[7] *Comm-Care Corporation v. M. Bolivar Bishop*, 673 So.2d 212 (La. App. 3rd Cir. 1996).

[8] *Comm-Care Corporation v. Louisiana Tax Commission*, 696 So.2d 969 (La. 1997).

Comm-Care did not own the Facilities on January 1, 1994 it had no basis to claim exemption for that year.[9]

While the 1994 case was pending, Comm-Care was asserting its claim of exemption from 1995 taxes in this case pursuant to Louisiana's "pre-deprivation" process[10] by administrative appeals to the assessors, local boards of review and state tax commission. On February 13, 1996, following a hearing and the introduction of uncontroverted evidence, the tax commission found that "Comm-Care Corporation is a non-profit corporation operated for health and welfare purposes, exempt from federal and state income taxation as required in the 1974 Constitution, Article VII, Section 21B(1)(a)." However, the tax commission, despite its finding that Comm-Care satisfied the constitutional requirements, ruled that the Facilities were somehow not exempt from ad valorem taxation: "The Commission further finds that after reviewing all the evidence presented by the parties in the proceeding, that Comm-Care was not operating the nursing homes in a 'charitable' manner. The Commission further finds that the nursing homes appear to be operated in the same manner as any "for-profit" organization would operate."

Comm-Care paid the 1995 taxes under protest on February 13, 1996, the same day the tax commission rendered its decision. On February 27, 1996, within thirty days of the tax commission's decision, Comm-Care filed a petition for

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[9] *Comm-Care Corporation v. Louisiana Tax Commission*, 706 So.2d 425 (Sup.Ct. 1998).

10 R.S. 47:1992, printed in full at Appendix 7.

review with the state district court.[11] The state district court summarily dismissed the suit on grounds that Comm-Care had failed to pay the contested taxes when due on December 31, 1995,[12] the state court of appeal affirmed,[13] and the state supreme court denied Comm-Care's application for certiorari.[14] In net effect, the state supreme court has let stand conflicting decisions between two state courts of appeal in the 1994 case as to taxpayers' post-deprivation access to the courts and, in this case, the decision of the state court of appeal denying Comm-Care its statutorily prescribed pre-deprivation remedy, which is in direct conflict in this case with a previous decision of another state court of appeal in *Rickey Tri-Key Partnership v. Dupleix*, 462 So. 2d 235, (La. App. 3d Cir. 1984), *writ denied* 464 So.2d 1385 (La. 1985). Louisiana taxpayers in the first judicial circuit must pay timely to avail themselves of either remedy, while those in the third judicial circuit need not. The rule in the second, fourth and fifth judicial circuits is anyone's guess.

REASONS FOR GRANTING THE WRIT

Imposition of a tax is a taking of property. Under the Fifth and Fourteenth Amendments to the United States Constitution, the power to tax is legally exerted only if, at some stage, the taxpayer is given an opportunity to contest illegal

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[11] Pursuant to R.S. 47:1998, printed in full at appendix 8. Comm-Care also satisfied the requirement of R.S. 47:2110E by paying the taxes under protest and filing suit within thirty days.

[12] See Reasons for Judgment printed in full at appendix 2.

[13] *Comm-Care Corporation v. Louisiana Tax Commission*, (unpublished opinion), printed in full at appendix 3.

[14] Appendix 4.

exactions in keeping with due process principles. *Central of Georgia R. Co. v. Wright*, 207 U.S. 127 (1907; *Mitchell v. M.T. Grant Company*, 416 U.S. 600 (1974).

Due process under the Fifth and Fourteenth Amendments requires the states to provide a clear and certain remedy for aggrieved taxpayers to contest tax assessments.[15] Otherwise, an unlawful tax exaction constitutes a deprivation of property without due process of law. A state may provide the requisite procedural safeguards either by pre-deprivation relief, post-deprivation relief or both.[16]

The due process issue presented in this case is whether R.S. 47:1998, as interpreted and applied by the state court of appeal, constitutes clear and certain pre-deprivation relief.

In *Carpenter v. Shaw*, 280 U.S. 363 (1930), the Choctaw Indian Tribe avoided a distress sale by paying property taxes under protest. The Supreme Court of Oklahoma denied the tribe's right to recover based on a provision of the state statute which allowed a refund suit only if the tax was paid timely. This Court reversed, holding that "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *Carpenter* at 369.

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[15] *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, (1990); *Iowa-Des Moines National Bank v. Bennet*, 284 U.S. 239 (1931); *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Ward v. Board of County Commissioners of Love County*, 253 U.S. 17 (1920); *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280 (1912).

[16] *Reich v. Collins, supra.*

This case involves a claim of exemption under the state's constitution, not a federal law. Nevertheless the holding in *Carpenter* applies. "[W]hile it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of the law."[17]

While the states are free to determine whether to provide a pre-deprivation remedy, a post-deprivation remedy, or both, the remedy or remedies it does provide must give taxpayers clear and certain relief.[18] Louisiana provides both remedies: the pre-deprivation administrative proceeding outlined in R.S. 47:1989-1998 and the post-deprivation proceeding described in R.S. 47:2110.

Thwarted in its efforts to have its day in court pursuant to the state's post-deprivation remedy the previous year, Comm-Care chose to contest the 1995 assessments pursuant to what on its face is a clear and certain pre-deprivation remedy as provided by R.S. 47:1989-1998. Comm-Care complied with each and every requirement set forth in those sections, only to be told by the state court of appeal that it had failed to comply with another requirement, which may be found only by reading the statute in *pari materia* with others.[19] This is a clear denial of due process.

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[17] *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682 (1930).

[18] *Reich v. Collins, supra.*

[19] *Comm-Care had a right to rely on R.S. 47:1989-1998 as written. La. Civil Code Art. 1; Johnson v. St. Paul Mercury Ins. Co.*, 236 So.2d 216 (Sup. Ct. 1970); Tate, *Louisiana and the Civil Law*, 39 La.L.Rev. 727, 743 (1962).

In *Reich v. Collins,*[20] this Court examined the Georgia supreme court's application of Georgia's post-deprivation remedy, which provides that "a taxpayer shall be refunded any and all taxes ... which are determined to have been erroneously or illegally assessed ... whether paid voluntarily or involuntarily." On *Reich's* first appeal, the Georgia supreme court construed the refund statute not to apply to "the situation where the law under which the taxes (were) assessed and collected is itself subsequently declared to be unconstitutional." On *Reich's* second appeal, the Georgia supreme court reasoned that states may choose to provide pre-deprivation or post-deprivation relief and that Georgia provided a satisfactory pre-deprivation remedy which *Reich* had failed to follow, therefore it was not a denial of due process to deny *Reich* relief under the state's post-deprivation statute. This court agreed that the states may provide one remedy or the other or both "so long as that scheme is clear and certain ...(and the state may) reconfigure its remedial scheme over time, to fit its changing needs . . . *but what a State may not do, and what Georgia did here, is to reconfigure its scheme, unfairly, in mid-course to bait and switch, as some have described it.*"[21]

This bait-and-switch scheme is the end result of the Louisiana courts' strained interpretation of the statute. The sequence of sections culminating in R.S. 47:1998 is designed by the legislature to provide for pre-deprivation relief. The state courts' interpretation of the statute adds an unwritten requirment and produces the same bait-and-switch result proscribed in *Reich.*

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[20] *Supra.*

[21] *Reich v. Collins, supra (emphasis added).*

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue herein to review the judgments and opinions of the courts of Louisiana.

Respectfully submitted,

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